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## Review of “Sovereign Prerogative: The Supreme Court and the Quest for Law,” By Eugene V. Rostow

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## BOOK REVIEWS

**THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW.** By Eugene V. Rostow. New Haven: Yale University Press, 1962. Pp., xxxi, 318. \$1.95 (paperbound).

Dean Eugene Rostow of the Yale University Law School has brought together nine of his previously published essays relating to the powers of the United States Supreme Court, to which he has added a general introduction. The essays appear as originally published, although cross-referencing footnotes and an index have been provided for the reader's convenience.

Rostow does an excellent job in spelling out his intentions—to present articles concerning the sources of the Supreme Court's "competence . . . , ideas . . . , and authority,"<sup>1</sup> and to examine certain specific aspects of the Court's work. According to the author, present-day serious writing about the Court:

concerns two sets of problems. The first involves differences as to the nature and function of law, and more particularly differences as to the duties and responsibilities of judges, as compared with other lawmakers, in the legal system we have inherited. The second turns on differences in weighing the relative importance of the various elements affecting the decision of particular cases or groups of cases.<sup>2</sup>

Rostow has gathered these articles because "their point of view is the minority position in the war of words now swirling about the Court's more important modern decisions."<sup>3</sup> But it is not just Rostow's position, for, as he himself indicates, the approach he utilizes is basically Yale's outlook as well. Claiming that labelling of this approach is difficult, he delineates it in part by calling the study of law "the universal social science." According to him, "an understanding of the goals of law necessarily draws upon all other bodies of systematic knowledge about man's life in society."<sup>4</sup> Law is influenced by history but also helps to influence it; legal institutions are related to social institutions and pressures, although the thrust of a body of legal norms exists in some sense apart from current social trends.

The relation of this general position to the current controversy about the Court's role is then made clear—the question is whether the judges ought to separate the law that *is* from the law that *ought to be*. Rostow argues that this should *not* be done and requests a powerful, although by no means

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1. P. xi.
  2. P. xii.
  3. P. xi.
  4. P. xiv.

an unlimited, role for the judges. The dean argues that the pronouncements of the loudest expounders of opposition to "judicial lawmaking" have not affected their own decisions, and he convincingly argues further that theories of "judicial self-restraint" do not provide a workable theory of judicial action. Judges must, almost by virtue of their position, exercise the "sovereign prerogative of choice" of which Holmes wrote, and from which the volume takes its title. Perhaps the best statements of Rostow's thesis appears in these words:

The powers of the Court are a vital and altogether legitimate part of the American Constitution. They should be used positively and affirmatively to help improve the public law of a free society capable of fulfilling the democratic dream of its Constitution in the turbulent second half of the twentieth century.<sup>5</sup>

The first two articles, particularly the highly technical *The Enforcement of Morals*, seem to be the least qualified candidates for inclusion in the volume, principally because they are not very well related to the central theme. While a fine piece of writing, *The Enforcement of Morals* requires considerable jurisprudential background and its principal purpose is to reply to a lecture not included in the present volume; it suffers from failure to state clearly and *initially* what the other fellow said. One also encounters this problem to a lesser extent in *American Legal Realism and the Sense of Profession*, also in the book's first section.

Rostow's general argument in the latter piece is that, while the Court has been meeting its responsibilities (in terms of his theory of its function in law-making), "the rest of the profession of law is not now rising to the challenge of its public responsibilities very well . . ."<sup>6</sup> However, after this thesis statement and some general discussion, Rostow wanders off, not to return to his intended subject until the last five pages of the essay, where he briefly lists some of the areas in which the legal profession could do more, particularly emphasizing the challenge to authority of law in the South, about which the bar remains silent. "The profession of law has a plain duty to lead in the effort to recreate a climate of legality in our society."<sup>7</sup> Perhaps the most interesting side-exursion in this article is Rostow's statement of disagreement with Herbert Wechsler's insistence on "neutral principles of constitutional law" in (as Rostow sees it) every case the Court decides. The dean feels that Wechsler's standard has never been fulfilled "by any common law court, nor by any other court; and . . . it never can

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5. P. xxxix.

6. P. 6.

7. P. 42.

be achieved, in the nature of the judicial process."<sup>8</sup> He further suggests that the United States Supreme Court "would have disappeared long ago from the stage of American life"<sup>9</sup> had it tried to follow Wechsler's standard, because it must be sensitive to powerful forces which resist its will and must have a "high sense of strategy and tactics,"<sup>10</sup> if it is to be an effective Court, not just a barren and sterile one.

The best, most lucid, writing of the volume is to be found in the second (*The Nature and Legitimacy of Judicial Review*) and third (*Toward An Affirmative Constitutional Theory of Judicial Action*) portions of the volume. Because the seven essays comprising these two sections are uniformly excellent, only selected comments need to be made about each. In *The Court and Its Critics*, we find an excellent general discussion of current critics of the Court, who Rostow feels "are uttering a protest which they find . . . hard to reduce to logical form. It is not so much a protest against the Court as against the tide of social change reflected in the Court's opinions."<sup>11</sup> Rostow specifically disagrees with the conclusion of the Conference of State Chief Justices that the United States Supreme Court has weakened the states or altered the character of our federal system. In devastating criticism, the author shows that the Court cannot have been guilty of lack of self-restraint and of allowing the federal government to expand. He suggests that the growth of the federal government would come from the justices' *avoiding* holding acts of the national government unconstitutional; Congress, not the Court, has been the source of national government expansion. And he holds that the facts show clearly that the Supreme Court has also deferred largely to the views of state legislatures, rather than denying state powers on a wholesale basis as charged.

In *The Supreme Court and the People's Will* and the two-part *The Democratic Character of Judicial Review*, Rostow deals with the Court's role in a political system called "democratic." To justify his assertion that the Supreme Court's power of judicial review is compatible with democracy, he takes the position that democracy is "a process more complex than the taking of a single vote"<sup>12</sup> and that "popular sovereignty is a more subtle idea than the phrase 'majority rule' sometimes implies."<sup>13</sup> The Supreme Court helps to enforce American democracy "by imposing severe and en-

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8. P. 32.

9. P. 34.

10. *Ibid.*

11. P. 111.

12. P. 115.

13. P. 118.

forceable limitations upon the freedom of the state,"<sup>14</sup> thus protecting the individual's freedom. We have, not simply popular sovereignty, but popular sovereignty *under law*. The Supreme Court speaks for the people as a whole as they speak through the Constitution. Rostow indicates that the people are the "final interpreters of the Constitution,"<sup>15</sup> and that without their willingness, the Supreme Court and its interpretations of the Constitution could not continue to exist.

According to the dean, the work of the Court is not the Court's substituting its will for that of Congress, but that of ascertaining Congress' will or of determining which power (of two or more which Congress possesses) should prevail. The Court is thus supplementing, not superseding, the legislative body. As Rostow states elsewhere, "nor . . . is it true as a matter of experience that a vigorous lead from the Supreme Court inhibits or weakens popular responsibility in the same area."<sup>16</sup> C. Herman Pritchett has recently affirmed this, noting that the political process will not be sapped by judicial action but is often stimulated by it, even into hyperactivity, as in the aftermath of recent race relations and reapportionment decisions. It is a static view, Pritchett argues, which holds that the more the courts do, the less the other branches of government can do.<sup>17</sup>

Two further comments should be made here: (1) While perhaps the Court is in the forefront of the fight for the protection of civil rights and civil liberties *now*, this has not always been the case, as others have cogently argued. (2) While willing to accept Rostow's thesis that "constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers,"<sup>18</sup> I would question whether this statement is sufficiently theoretically sound to be applicable to other situations, which should be the case concerning general arguments about the relation of judicial review to democracy.

In *The Japanese American Cases—A Disaster*, the longest essay in the collection, Rostow applies his incisive analytical abilities to a specific set of cases. His basic argument—and he is, of course, not alone in making it—is that "our wartime treatment of Japanese aliens and citizens of Japanese descent on the West Coast was hasty, unnecessary, and mistaken,"<sup>19</sup> as well as "the worst blow our liberties have sustained in many years."<sup>20</sup> The author's writing is powerful and his discussion of the continuing relevance of

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14. P. 120.

15. P. 142.

16. P. 167.

17. *Political Questions and Judicial Answers*, address to the Midwest Conference of Political Scientists in Madison, Wisconsin, May 1, 1964.

18. P. 156.

19. P. 193.

20. P. 194.

*Ex parte Milligan*<sup>21</sup> is superb. However, for Rostow, the actions of General DeWitt must have been *either* constitutional *or* unconstitutional; some judges, particularly Justice Jackson, with whom Rostow is quite harsh,<sup>22</sup> felt there was a middle ground: to defer to military necessity in the instant case without explicitly legitimizing it for future use. This reviewer would argue that a difference does exist between calling an action constitutional and upholding it on other grounds; for Rostow, in the Japanese-American cases, neither possibility should have been followed. Certainly the author must be aware that the Court frequently does not decide constitutional issues, not because they are not there, but because the justices choose to *perceive* that they are not there. While Rostow's conclusions follow well from his general view of the judicial process, I think his commitment to this view has led him to a less balanced evaluation of the justices' positions than is possible. He also argues that the courts must adjudicate conflicts between individuals and authority brought about by military decisions while recognizing simultaneously that "most occasions for the exercise of authority in the name of military need will not present justiciable controversy."<sup>23</sup> However, he provides no answer to the question of how one decides in which category a particular situation falls.

The final two short essays with which the volume concludes, *Needed—A Rational Security Program* and *The Price of Federalism*, continue the application of general theory to specific areas of public law. Both add to the general contribution the book has to make.

THE SOVEREIGN PREROGATIVE is certainly a worthwhile addition to our growing literature in the field of constitutional law for at least two reasons. One is that it brings together the writings of one who has had a definite impact on our discussion of specific cases and the role of the Supreme Court in our system of government, and makes those writings more easily accessible to the broad audience which should become acquainted with them. The other, and more important, reason is that these essays taken collectively and with the reservations noted above contribute to the essential dialogue about the role of the United States Supreme Court. Rostow's conclusion is that "we need a more coherent and explicit doctrine of judicial action in advancing the cause of constitutional democracy."<sup>24</sup> His book, while not providing final answers, certainly contributes some extremely relevant and important thoughts to assist in the development of such doctrine.

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21. 71 U.S. (4 Wall.) 2 (1867).

22. "Mr. Justice Jackson wrote a fascinating and fantastic essay in nihilism." P. 226.

23. P. 233.

24. P. 305.